(36)

Office - Supreme Court, U. S.
FILED
JUN 17 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 176

THE STATE OF NORTH DAKOTA,
Petitioner,

vs.

RAPHAEL JEROME SZARKOWSKI.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

ALVIN C. STRUTZ,
Attorney General,
P. O. SATHRE,
Assistant Attorney General,
C. E. BRACE,
Assistant Attorney General,
Counsel for Petitioner, The State of North Dakota,
State Capitol,
Bismarck, North Dakota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX

	Page
Opinions Below	1
Jurisdictional Statement	1
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting Writ	4
Conclusion	6

CITATIONS

City of Corinth vs. Robertson, 125 Miss. 31, 87 So. 464	5
Erickson vs. Cass County, 11 N. D. 494, 506, 92 N. W. 841	5
Harvison vs. Griffin, 32 N. D. 188, 196, 155 N. W. 655, 657	5
Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106	4
Magnolia Petroleum Co. vs. Price, 86 Okla. 105, 206 Pac. 1033, 1036-7	5
Murtaugh vs. C., M. & St. Paul Ry. Co., 102 Minn. 52, 112 N. W. 860	5
Newton vs. State Board of Land Commissioners, 37 Idaho 58, 219 Pac. 1053	5
Newton vs. Weiler, 87 Mont. 164, 286 Pac. 133	5
North Dakota Horse and Cattle Co. vs. Serumgard, 17 N. D. 466, 490, 117 N. W. 453, 463	5
O'Brien vs. Wilson, 51 Wash. 52, 97 Pac. 1115	5
State vs. Divide County, 68 N. D. 708, 283 N. W. 184	5
State vs. Towner County, 68 N. D. 629, 283 N. W. 63	5
State vs. Whitney, 66 Wash. 473 120 Pac. 116, 121	5
United States vs. Fenton, 27 F. Supp. 816 (D. C. Idaho, S. D.)	5

STATUTES

Bankruptcy Act, Sec. 75(s)	2, 4, 6
(49 Stat. 943-945)	2
Article IX, N. Dak. Const.	2
Sec. 205, N. Dak. Const.	3
Sec. 7754, Compiled Laws N. Dak. 1913	3

INDEX TO BRIEF

	Page
Statement of Facts	7
Points Urged on Petition for a Writ of Certiorari	8
I. Redemption from holder of foreclosure sale certificate for less than law provides takes property without due process.	8
II. Congress is equally bound with the State Legislature to preserve and protect State school funds derived from land grants	8
Argument	8
Point 1	8
Point 2	9
Conclusion	11

CASES CITED

Boeing Air Transport vs. Farley, 75 F. (2d) 765, 767, 64 App. D. C. 162	9
Harvison vs. Griffin, 32 N. D. 188, 155 N. W. 655	9
Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106	9
North Dakota Horse and Cattle Co. vs. Serumgard, 17 N. D. 466, 117 N. W. 453	9
State vs. Whitney, 66 Wash. 473, 120 Pac. 116, 121	10

STATUTES AND CONSTITUTIONS

Section 7754, C. L. North Dakota, 1913	8
Chapter 211, S. L. 1933, Section 1	8
Section 8085, C. L. North Dakota, 1913	8
Section 205, Constitution of North Dakota	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

THE STATE OF NORTH DAKOTA,

Petitioner,

vs.

RAPHAEL JEROME SZARKOWSKI.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Attorney General of the State of North Dakota, for and on behalf of the State of North Dakota, prays that a Writ of Certiorari issue to review the judgment of Circuit Court of Appeals for the Eighth Circuit entered in the above case on April 19th, 1944, affirming the order of the District Court for the District of North Dakota of August 5th, 1943.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals is reported in 141 F. (2d) ....

JURISDICTIONAL STATEMENT

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on April 19th, 1944. The jurisdiction of this court is invoked upon two grounds:

1. The court below, by its judgment, has applied Section

75 (s) of the Bankruptcy Act (49 Stat. 943-945) so as to take petitioner's property without due process in violation of the Fifth Amendment to the Constitution of the United States.

2. The court below has so applied the act above referred to as to deny to the State of North Dakota acting in its sovereign capacity as trustee of the permanent school funds arising from the land grant made by the Enabling Act, approved February 22nd, 1889, the protection of the contract or compact existing between the United States and the State of North Dakota by reason of the acceptance of said land grant and the constitutional guaranty of the protection and administration of said fund. (Enabling Act, 25 U. S. Stat. at Large, p. 676, Article IX, Constitution of North Dakota.) The Circuit Court of Appeals, by its judgment sought to be reviewed, has decided two important questions of Federal law, which have not been, but should be, settled by this court.

QUESTIONS PRESENTED

Two questions are presented:

1. May a farmer-debtor bankrupt redeem from a foreclosure sale certificate holder for a less amount than provided by law of state where foreclosure was made, thereby depriving such certificate holder of his property without due process of law?

2. Are not Congress and the Legislature of the State of North Dakota equally bound by a contract or compact existing between the Federal Government and the State of North Dakota, by reason of the grant of public lands for school purposes made by the Federal Government and the acceptance of such grant by the State and its guaranty to protect and administer the funds arising from the sale of such lands as a trust fund?

STATUTES INVOLVED

Enabling Act, approved February 22nd, 1889 (25 Stat. at Large 676), Articles IX and XVI (Sec. 205), North Dakota Constitution, and Section 75 (s) of the Bankruptcy Act (49 Stat. 943-945).

STATEMENT

On March 19th, 1937, the State loaned Joseph M. Szarkowski, brother of the debtor herein, $3,200.00 of the permanent school funds of the State, derived from sale of lands granted by the United States to the State for support of the public school system by the Enabling Act under which the State was admitted to the Union. The loan was secured by a first mortgage on certain farm lands. Before the loan was completed, and without notice to the State, Joseph deeded these lands to his eighteen-year-old brother, Raphael, the debtor herein. No part of the loan or interest was paid and the State foreclosed and bid in the land for $3,863.20, the full amount due on the secured debt. The State held the certificate of foreclosure sale issued on such foreclosure at the time this bankruptcy proceeding was commenced. The property was valued by the Conciliation Commissioner at $1,300.00, and the debtor's right to redeem at that amount is fixed by the judgment we are now seeking to review. By the law of North Dakota, redemption may be made by the mortgagor or any subsequent lienholder by paying the purchase price with interest at six (6) per cent to date of redemption. (Secs. 8085, 7754, Compiled Laws 1913; Ch. 211, Laws 1933.) Foreclosure sale was had January 21st, 1942. By such a redemption for $1,300.00 the school fund will suffer an immediate loss of over $3,000.00; for, if no redemption were made, the State could hold the land until it could be sold for the amount invested in it.

REASONS FOR GRANTING WRIT

On its appeal to the Circuit Court the State urged the two propositions:

1. Redemption from holder of foreclosure sale certificate cannot be made for less than amount fixed by state law without depriving the certificate holder of his property without due process in contravention of the Fifth Amendment to the Constitution of the United States.

2. Congress, not having expressly so provided, cannot be held to have intended by Section 75 (s) of the Bankruptcy Act to so apply the law as to violate the contract or compact existing between the Federal Government and the State by reason of the land grant made by the Enabling Act and the acceptance thereof under the conditions and limitations of the grant by its Constitution.

The Circuit Court of Appeals, as we read its opinion, holds that both of these questions have already been determined conclusively by the Supreme Court adversely to the State, your petitioner. With all respect due to the court, we just as firmly assert that neither of these questions has ever been determined by this court and particularly not by the cases cited in its opinion by the Circuit Court.

The Supreme Court, in *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106, distinctly and unequivocally held that "the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." And in that case, as well as in all subsequent cases considered by the Supreme Court, the court was considering only the rights of a mortgagor and a mortgagee under a subsisting mortgage. In this case, there is no mortgage involved, since by the foreclosure sale the mortgage debt has been fully paid and now

the only rights involved are those of purchaser and redemptioner. *Harrison vs. Griffin*, 32 N. D. 188, 196, 155 N. W. 655, 657; *North Dakota Horse and Cattle Co. vs. Scrumgard*, 17 N. D. 466, 490, 117 N. W. 453, 463. The purchaser now holds a property right in the land, and not simply a lien thereon. This property right can only be taken away by due process of law, and that due process is by the exercise of the statutory right of redemption. And in no case has this court considered the question of the respective rights of Congress and the State Legislature under the contract or compact above referred to. That such a contract or compact exists is distinctly held by several State Courts.

State vs. Whitney, 66 Wash. 473, 120 Pac. 116, 121.

Newton vs. State Board of Land Commissioners, 37 Idaho 58, 219 Pac. 1053.

Magnolia Petroleum Co. vs. Price, 86 Okla. 105, 206 Pac. 1033, 1036-7.

City of Corinth vs. Robertson, 125 Miss. 31, 87 So. 464.

Erickson vs. Cass County, 11 N. D. 494, 506, 92 N. W. 841.

United States vs. Fenton, et al., 27 F. Supp. 816 (D. C. Idaho, S. D.).

And many states have as conclusively held that such compact may not be violated by the State Legislature.

Erickson vs. Cass County, supra.

State vs. Divide County, 68 N. D. 708, 283 N. W. 184.

State vs. Towner County, 68 N. D. 629, 283 N. W. 63.

Murtaugh vs. C., M. & St. Paul Ry. Co., 102 Minn. 52, 112 N. W. 860.

Newton vs. Weiler, 87 Mont. 164, 286 Pac. 133.

O'Brien vs. Wilson, 51 Wash. 52, 97 Pac. 1115.

State vs. Whitney, supra.

United States vs. Fenton, supra.

In view of the fact that other cases are now pending in which these questions are involved, and, since Congress has recently extended the life of Section 75 of the Bankruptcy Act, others are apt to arise since the State has millions of dollars of its school funds invested in farm mortgage loans, it is of considerable importance that these questions be finally determined by this court.

CONCLUSION

The decision below, we believe, erroneously determines questions which, when applied to this case and others now pending, results in an arbitrary taking from the State a considerable amount of the trust fund given it by the Federal Government without due process of law and in violation of a compact which binds both Congress and the Legislature to protect the fund. Therefore, we believe that this petition for a Writ of Certiorari should be granted.

May 18th, 1944.

THE STATE OF NORTH DAKOTA,
Petitioner,
By ALVIN C. STRUTZ,
Attorney General,
P. O. SATHRE,
C. E. BRACE,
Assistant Attorneys General,
Counsel for Petitioner,
Bismarck, North Dakota.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. .....

THE STATE OF NORTH DAKOTA,

Petitioner,

vs.

RAPHAEL JEROME SZARKOWSKI.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Briefly, the facts are as follows:

On March 19th, 1937, the lands involved herein were mortgaged to the State of North Dakota to secure a loan of $3,200.00 of the State School Fund, derived from sale of lands granted to the State by Congress by the Enabling Act of February 22nd, 1889. This mortgage was foreclosed and the property sold to the State for the full amount due on the mortgage and costs amounting to $3,863.20, on January 21st, 1941 (R. 88). Petition of farmer-debtor was filed January 19th, 1941, after foreclosure sale (R. 1). On revaluation, the Conciliation Commissioner valued the property for purposes of redemption at $1,300.00 (R. 97). This valuation was approved by the District Court (R. 100). And such valuation was approved by the judgment of the Circuit Court of Appeals by its judgment of April 19th, 1944.

POINTS URGED ON THE PETITION FOR A WRIT OF CERTIORARI

1. May a farmer-debtor bankrupt redeem from a foreclosure sale certificate holder for a less amount than provided by law of state where foreclosure was made, thereby depriving such certificate holder of his property without due process of law?

2. Are not Congress and the Legislature of the State of North Dakota equally bound by a contract or compact existing between the Federal Government and the State of North Dakota, by reason of the grant of public lands for school purposes made by the Federal Government and the acceptance of such grant by the State and its guaranty to protect and administer the funds arising from the sale of such lands as a trust fund?

ARGUMENT

Without discussion in detail of the authorities relied upon by the petitioner on the merits, we will call the court's attention briefly to the principal points and the supporting authorities.

I. Under the law of North Dakota, redemption from a foreclosure sale may be made within one year after sale by the mortgagor or any subsequent lienholder by paying to the certificate holder the amount of his bid plus interest.

Section 7754, C. L. North Dakota, 1913.
Chapter 211, S. L. 1933, Section 1.
Section 8085, C. L. North Dakota, 1913.

Certainly, to allow a private person, the mortgagor, or any other redemptioner, to redeem for less than the amount fixed by law, is to take another's property for the benefit of the re-

demptioner. This is taking the certificate holder's property without due process.

Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.

Boeing Air Transport vs. Farley, 75 F. (2d) 765, 767, 64 App. D. C. 162.

The State, as holder of the certificate of sale, was no longer a lienholder, but its lien had merged into an equitable title to its property, defeasible only by redemption according to due process of law.

Harrison vs. Griffin, 32 N. D. 188, 155 N. W. 655.

North Dakota Horse and Cattle Co. vs. Serumgard, 17 N. D. 466, 117 N. W. 453.

The Bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106.

Therefore, the Bankruptcy Act, Section 75 (s), to preserve its constitutionality, must not be so construed as to permit the redemption from a foreclosure sale purchaser and certificate holder for less than the state law under which he purchases guarantees—the purchase price plus interest.

II. The money loaned and invested in the certificate here involved, $3,863.20, is a part of the school fund derived from sale of lands granted to the State by Congress for support of its schools.

In the State of Washington, the Supreme Court was considering the question whether or not an act of Congress mak-

ing certain lands theretofore subject only to preemption, subject to the general homestead laws, had the effect of making sections 16 and 36 of each section granted the State for its schools subject to homestead entry.

> "The two subjects are so dissimilar that it cannot be held, in the absence of any clear expression to that effect, that in the passage of the latter act, Congress had the former in mind, and was intending to withdraw the special exception granted these four states; and that having created an exemption from any form of public entry as to Sections 16 and 36, as one of the conditions of the proposal under which the privilege of admission was extended to the States (Washington, Montana, North Dakota and South Dakota), as soon as this proposal was accepted by the people and the constitutions they had framed had been approved, and thus a solemn compact entered into between the States and the United States, whereby each contracted to hold inviolate the rights of the other, Congress sought to withdraw any portion of its proposal and to again restore these two sections to the public domain. To so hold is to our minds to accuse Congress of bad faith."
>
> *State vs. Whitney,* 66 Wash. 473, 120 Pac. 116, at page 121.

The State of North Dakota, by its Constitution, accepted these land grants in the following language:

> "The State of North Dakota hereby accepts the several grants of land granted by the United States to the State of North Dakota by an act of Congress entitled 'An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington to form Constitutions and State governments, and to be admitted into the Union on equal footing with the original states, and to make donations of public lands to such states,' under the conditions and limitations therein mentioned; reserving the right, however, to apply to Congress for modifications of said conditions and limitations in case of necessity."
>
> Section 205, Constitution of North Dakota.

Is there any question that a contract or compact exists between the United States and the State of North Dakota, whereby each is absolutely bound to protect the school fund arising from the sale of the lands so granted? And is there any question that, to construe the Bankruptcy Act (Sec. 75 (s)) so as to allow a redemption from the certificate held by the State under which it is entitled to $3,863.20, with interest, to effect a redemption by the farmer-debtor for $1,300.00, is to violate that contract?

CONCLUSION

We conclude that Section 75 (s) of the Bankruptcy Act does not authorize a redemption from a foreclosure certificate holder for less than the state law provides, since such effect is in violation of the Fifth Amendment; and that to so apply the act to this case as to cause a loss to the State of over $3,000.00 of its school funds, is to so construe the act as to violate the contract or compact between the United States and the State of North Dakota.

Therefore, the judgment of the Circuit Court of Appeals is erroneous and should be reversed. We earnestly urge that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

THE STATE OF NORTH DAKOTA,
Petitioner,
ALVIN C. STRUTZ,
Attorney General,
P. O. SATHRE,
Assistant Attorney General,
C. E. BRACE,
Assistant Attorney General,
Counsel for Petitioner.

JUL 20 1944
CHARLES ELMORE CROPLEY
CLERK

(37)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 176

THE STATE OF NORTH DAKOTA,

Petitioner,

vs.

RAPHAEL JEROME SZARKOWSKI.

OBJECTIONS

TO

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARTHUR L. KNAUF,
Attorney for Raphael Jerome Szarkowski,
Jamestown, North Dakota.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

THE STATE OF NORTH DAKOTA,

Petitioner,

vs.

RAPHAEL JEROME SZARKOWSKI.

OBJECTIONS TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Objection is respectfully made to the granting of the writ of Certiorari upon the ground that no Constitutional or Federal question is involved in the appeal, and that the writ should be denied.

Dated July 7th, 1944.

Respectfully submitted.

ARTHUR L. KNAUF,
Attorney for Raphael Jerome Szarkowski.

On the facts it is respectfully submitted that this attempted appeal and review of the decision of the Circuit Court of appeals in this case is without merit.

Heretofore the identical question sought to be raised here was attempted in the Supreme Court of North Dakota,

and in the case of the State of North Dakota vs. Divide County, 68 N. D. 708 : 283 N. W. 184, the Supreme Court of North Dakota stated:

"The State earnestly urges that because this mortgage is given for school funds it has a character entirely distinctive from the ordinary first mortgage lien. There is nothing in the constitutional provisions cited or in the provisions of this S287 of the Compiled Laws, as amended, which describes the character and nature of the mortgage or in any way indicates that it is of a nature different from the ordinary mortgage.

"Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession." Comp. Laws 1913, S 6725.

"It is a security for the performance of an obligation, usually the payment of money. 'The mortgage is an incident of the debt'. Miller v. Smith, 20 N. D. 96, 101, 126, N. W. 499; Dean v. Smith, 53, N. D. 123, 133, 204 N. W. 987. Contracts of mortgage are subject to all the provisions of chapter 86 of the Civil Code dealing with liens in general. Compiled Laws, S 6703.

"Notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien." Comp. Laws, 1913, S 6709.

"This mortgage involved is merely a pledge of specific property as security for a debt or the performance of a duty. Whatever may have been the effect of a real estate mortgage in the past upon the title, it is clear under our statute that the mortgage in itself conveys no title to the land. It merely pledges the land as security for the debt. It is true that under foreclosure proceedings, the title to the land may be transferred when the mortgage is foreclosed and the property sold to someone for the purpose of collecting the debt, but the mortgage itself makes no change in the title.

"There is nothing in our statutes which gives to a mortgage to secure the payment of money derived from the permanent school fund any other status than a mortgage in general. When the board of University

and school lands takes a mortgage on real estate to secure repayment of money loaned from the school fund, it takes a mortgage which in no essential principle differs from the ordinary mortgage, and as between a lien claimed by a subdivision of the state and such mortgage lien, the mortgage becomes a lien upon the real estate affected from and after the time the mortgage is given."

That the right of Congress to legislate on the subject of Bankruptcy is granted by the Constitution in general terms.

Wright vs. Vinton Mountain Trust Bank,
300 U. S. 440, 468; 81 L. Ed. 736.

and the mortgage contract was made subject to constitutional power in Congress to legislate on the subject of bankruptcies:

Wright vs. Union Central Life Ins. Co.,
304 U. S. 504; 82 L. Ed. 1490;

State of North Dakota vs. Szarkowski,
142 Fed. 2nd 333.

The State of North Dakota in making real estate loan takes on the status of a citizen or any other concern, and when it enters the loan business or any other business it does so subject to its limitations and liabilities.

Bank of U. S. vs. Planters Bank, 6, L. Ed. 244;

Sargent Co. vs. State, 47 N. D. 56.

It is respectfully submitted that the petition for a Writ in this case should be denied.

Dated July 7th, A. D., 1944.

ARTHUR L. KNAUF,
Attorney for
Raphael Jerome Szarkowski,
Jamestown, North Dakota.